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WHAT SHOULD BE DONE ABOUT EMERGENCY STRIKES?*

By

I. HERBERT ROTHENBERG**

In the January, 1950 issue of the *LABOR LAW JOURNAL* there was carried an article entitled "What Should Be Done About Emergency Strikes?" Apart from what may be considered certain *non sequiturs* and digressions, it was a rather interesting article. In dealing with "emergency strikes," the article revolves around a theme which is, or at least should be, a matter of moment and interest to all classes of people, standing second only to the national labor problem as a whole. While many of the views expressed in the said article are of primary and manifest validity, the author disposes with too facile dispatch every effort or suggestion by third persons for the solution of this important problem.

Indeed, the author's proposal invites consideration. But the same may be said for any proffered solution to this enormous problem.

The problem of emergency strikes or, to be more exact, the labor problem as a whole so intimately concerns the welfare of all of the people, and is of such capital importance to each of us, that no proposal dare be completely ignored or disregarded. The urgency of the problem is so pressing and the need for solution so dire that it is very little less than presumption for anyone to exclude or reject *any* proposal or effort at solution without making a fair and objective evaluation of the proposal, or on the basis of only a superficial examination. The value of the appraisal or the examination is measured in direct proportion to whether the examiner seriously seeks an answer in the subject of the examination or whether he is using the examination merely as a device for discarding the subject. It is quite conceivable that, ensconced in the complications and impracticabilities of the most inutile and impossible proposal, may rest the nucleus of an idea which, with more practical development, may be the very solution which is so eagerly and so universally sought. Objective appraisal requires objective examination. The obviously painstaking and elaborate research done by the author to locate auxiliary written support for his *critique* of the proposals and efforts of others is the best witness of his pre-determination to dispatch rather than explore these premises. Slight effort in the other direction would have yielded an equal amount of written authority to display the *merit* of those proposals and efforts of others which the author too readily dis-

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paraged.¹ Repeated readings of the subject article failed to disclose any adequate justification for such consignment to the limbo of blunder or ineptitude of the considered efforts of others to find a solution to this monumental problem. Discounting the *lesser* persons or things which the author roundly castigates and rejects, the following is a partial recitation of the matters, entities and personalities whom the author implacably delivers to the realms of futility or worse: Sherman Anti-Trust Act, the National Association of Manufacturers, Senator Ball of Minnesota and his bill (S. 133) of 1947, compulsory arbitration, the Ball-Burton-Hatch Bill of 1945, the War Labor Board, the legislation of eleven states respecting arbitration in labor disputes involving public utilities, the Taft-Hartley Act, the proposed and separate Taft and Wood Bills of the Eighty-first Congress, the late President, William Howard Taft, the United States Conciliation Service, the War Labor Disputes Act, former Secretary of the Interior Krug, several concededly expert students of labor relations who presumed to make proposals which are at variance with the author's, and sundry and various other things, proposals and persons. Having thus demonstrated the unacceptability and futility of the efforts and suggestions of all others, the author then delivers his own significant proposal. This proposal consists of the *startling* suggestion that the government seize the properties, plants and facilities of employers and expropriate their profits.

It is opportune, at this point, to advert to the article itself, and to scrutinize the precursory premises and assumptions upon which its conclusions are predicated, and thereafter to examine the author's personal proposal, which he proffers with the concomitant intimation that it is the *only* solution to this pressing and otherwise insoluble problem. The article commences with the propositions that the problem is one which requires the detached and long-range thinking which one can give to it only in the calm and serenity of undisturbed times; that panaceas frantically conceived in the passions and pressures of distress are more likely to be provocative of increased crises than of a sane solution to the problem. With these introductory observations there can be no quarrel. There are then presented five postulates

1. *Compulsory Arbitration*: Carl A. Huebner, *Compulsory Arbitration of Labor Disputes*, 30 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 123 (1946); J. A. Sprunk, 47 MICH. L. REV. 242 (1948); W. K. Ratliff, 2 SOUTHWESTERN L. J. 182 (1948); Eugene C. Gerhart, 30 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 116 (1946); Donald R. Richberg, *Labor Disputes and Public Utilities*, 19 LRRM 143 (1947); Jerre S. Williams, *Compulsory Settlement of Labor Disputes*, 27 TEX. L. REV. 587 (1949); Governor Allen, 123 COLUMBIA UNIVERSITY STUDENT IN POLITICAL SCIENCE, No. 2, p. 41 (1926); Frank Parsons, 17 ARENA 663 (1897). *Government Seizures in Labor Disputes*: B. F. Wilcox and E. S. Landis, 34 CORN. L. Q. 155 (1948); G. C. Viethier, 6 PUBLIC ADMINISTRATION REVIEW 149 (1946). *Miscellaneous*: L. J. Boudin, *The Supreme Court and Labor*, 47 COL. L. REV. 979 (1947); D. L. Glickman, *The Labor Movement in Australia and New Zealand*, 16 SOCIAL RESEARCH 199 (1949); O. W. Phelps, *Public Policy in Labor Disputes*, 55 J. POL. ECON. 189 (1947); C. P. Malick, *A New Constitutional Status for Labor Unions*, 21 ROCKY MT. L. REV. 260 (1949); H. W. Edwards, *Industrial Conflict and Public Welfare*, 14 NEV. STATE B. J. 65 (1949); J. C. Knox, *Interstate Commerce and Labor*, 14 I. C. C. PRACTITIONERS' JOURNAL 12 (1946); D. Miltrany, *Nationalization of the Labor Movement*, 28 JOURNAL OF COMPARATIVE LEGISLATION (third series) 115 (1946); Senator Ferguson (Michigan), CONGRESSIONAL DIGEST (March 1947), p. 92; Orwell de R. Foenander, *SOLVING LABOR PROBLEMS IN AUSTRALIA* (Melbourne University Press, 1941); Ross, *Recent Developments in Australian Industrial Relations*, 2 INDUSTRIAL AND LABOR RELATIONS REVIEW 98.

as standards against which the validity of any proposed solution may be measured. The first four of these—(1) that we are a free and democratic people; (2) that we are committed to collective bargaining; (3) that the American system of private enterprise is not only the most desirable but also the greatest guarantee of democracy; (4) that the American labor unions are free and private associations which are entitled to the rights and prerogatives which attend that status—do not admit of controversy. The projected fifth axiom, however, is so disputable and questionable that, at best, it merits only the classification of an *argument*, rather than the dignity of a postulate. This attempt to force the facts reads as follows: "(5) The emergency strike does not normally result from the use of illegal means; nor is it called, in the generality of cases, to achieve unlawful or revolutionary objectives. It arises from the use of customary strike tactics, and its peril comes from the type of industrial situation in which it is employed."

Strike Means and Objectives

If one were substantially to guide himself by this doubtful proposition in seeking a solution to the problem of emergency strikes, the product of his labors would fall far short of the full requirements of the problem to be solved. Without unduly laboring the point, it is submitted that, in appraising the validity of this suggested assumption, one should reflect upon the political peregrinations of Harry Bridges before, during and since the Russo-German Non-Aggression Pact and the spectacular coincidence of the maritime stoppage with the expression of Soviet antipathy for the Marshall Plan program and the intercontinental movement of goods in implementation of that program, to determine how squarely the emergency created by the maritime strike fits into the author's fifth assumption of fact. Again, while we cannot predict what turn future events may take, as of this writing John L. Lewis under injunctive compulsion is loudly protesting that he is helpless to prevent the members of his United Mine Workers from continuing their current diminution of the "three-day" week into a "no-day" week. As the national stockpile of coal dwindles to a point of immediate peril, Mr. Lewis, moved only by his interest in the national well-being and safety, strives mightily but vainly to persuade his minions to return to the mines. This tableau of passion and helplessness would be pathetic, except for the fact that something doesn't quite fit. Perhaps it could be Mr. Lewis. He has never been known to suffer in any recognizable degree with the malady of helplessness. It may be remembered that in the coal strike of 1947 he similarly presented himself in the seraphic trappings of innocence. However, Judge Goldsborough, unimpressed, twice levied enormous and unprecedented fines upon the United Mine Workers and upon Mr. Lewis personally as evidence of his unreasonable incredulity. With the smell in one's nostrils of the Lynch, Kentucky, riot of last February 5—in which the activities of a delegation of Mr. Lewis' *goodwill ambassadors* moved a federal investigating agency, in an epic of understatement, to characterize these activities as "assaults and batteries on employees, the display and use of physical force and violence, depriving the employees of their

freedom of movement through the use of physical force and the display of deadly weapons"—one finds himself plagued by a small but haunting doubt at Mr. Lewis' cast in the role of tragic helplessness. Indeed, the situation would be humorous were it not for the gravity and desperateness of the circumstances. In these serious and perilous circumstances Lewisonian *cuteness* is intolerable.

"Emergency Strikes"

In speaking of the "generality of cases" in regard to emergency strikes, if the author of the subject article means strikes which have been declared by the President to be emergency strikes, then there is no generality of cases, since there have been only six such strikes: meatpackers', bituminous coal miners', long distance telephone workers', Pacific maritime workers', atomic project workers' and Atlantic longshoremen's strikes. If such is the meaning of the term "emergency strikes," then even these few strikes—or at least a sufficient percentage of them—were of such inspiration and execution as to preclude any confidence in the author's presupposition that emergency strikes are ever fair strikes, called for fair objectives and executed by fair means. On the other hand, if the term comprehends those strikes which, while not distinguished by presidential recognition, nevertheless create real and actual distress to substantial segments of the population, then the author's postulate becomes completely unreliable.

It might at this juncture be fruitful to examine the term "emergency strike" with a modicum of care, for the term itself is such that, without adjunctive construction or, in many cases, because of tendered interpretation, it may be or become meaningless. To be sure, it lends itself as a ready subject of philosophical ambidexterity. Like Janus' face, the visage one sees depends on the position in which one stands.

There can be no question that a certain strike may be classed as an emergency strike per se, with or without the benefit of executive grace. Such a strike need not be of national proportions nor need it concern the welfare of the nation as such or of any substantial part of the nation. No one could doubt that the shutting-off of the entire water supply of whole communities by a strike of the employees of a privately owned waterworks would constitute a real and living emergency. Would the absence of presidential proclamation or the inapplicability of the Taft-Hartley Act's definition² render such an insufferable circumstance any the less an "emergency" to the residents of the community whose first essential of life has been seized from them? Even though the strike might cross common boundary of two contiguous states and thus involve *commerce*, it would hardly fall within an honest and untortured interpretation of the act. It would therefore not fall within the act's connotation of an *emergency* strike. But would this render the actual emergency to the communities' residents any the less dangerous or acute? Nor could one per-

² Title II, Section 206: "a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof" which "will, if permitted to occur or continue, imperil the national health or safety."

suade the seven and a half million citizens of a metropolis like the City of New York that the paralysis of their community by a transportation strike is no *real* emergency because the language of the Taft-Hartley Act doesn't fit the circumstances neatly enough.

Shortly prior to this writing the Senate Labor Committee heard the testimony of James Boyd, Director of the United States Bureau of Mines. He tendered authoritative admonition that the nation's coal pile was being rapidly reduced to a point where, in twenty days or less, unless something was done to rescue the situation, the entire nation would suffer disastrously. There was no question but that a real and acute emergency existed. However, President Truman for whatever the reason, did not see fit to exercise his prerogatives under the Taft-Hartley Act until the necessity of rationing coal forced his hand. There were very few who doubted that an emergency existed presidential proclamation or no presidential proclamation. The emergency may not have fallen within the jurisdiction of the Taft-Hartley Act. But it was no less critical because of that fact. In truth, it may be said that *every strike creates an emergency*. While it undoubtedly has lesser interpretations, the most pungent meaning that can be accorded to the term "emergency" is that of a *crisis*. If that be the case, then, assuredly, every strike creates a crisis and, in some degree, is an emergency strike. We are not unaware that this assertion invites an accusation of sophistry. One may sneer, "Preposterous!" or with patronizing pomposity volunteer, "Indeed? That is not what *I* understand to be an emergency strike." Possibly not. But that does not alter the fact; for the fact *is* that every strike *does* create a crisis and, hence, an emergency. The nature and extent of the crisis is purely a matter of degree.

It is indeed unfortunate that the element of geography has obtruded itself into the problem to confound the basic issue. An infinitely more acute crisis may arise from a local strike in the New York harbor by tugboat operatives than from a dozen national strikes in the bottle manufacturing industry. It is illusory, then, to suppose that the only emergency strikes are those which occur under the Taft-Hartley Act, or that the geographical ambits of the controversy are the governing criteria of the crisis produced. From this it necessarily follows that in treating with so-called emergency strikes one necessarily deals with crisis controversies over and beyond—or, more properly, under and beneath—the Taft-Hartley species of emergency strike.

According to the Department of Labor, in the two and a half year period elapsing since 1947, the year in which the Taft-Hartley Act was promulgated, 9,737 strikes have occurred. In this same hiatus of time there have been six emergency strikes of the Taft-Hartley variety. If the prodigious and untiring labor and effort that have and are being expended in interested quarters throughout the country in pursuit of a solution to the basic strike problem have produced, or will produce, a panacea that is utile only six times in a period of almost three years during which 9,731 other strikes occurred, then the mountain has labored in vain for it brought forth only a mouse. While the six strikes in question were of undoubt-

ed importance taken as a whole, in the respect that, collectively, they have affected and produced the recent mutations in the national economy and hence the national welfare, the 9,731 strikes are no less important than the six strikes, and no less urgently require pragmatic solution. The basic problem in all strikes—the "little" strikes and the "big" strikes, those that produce the Taft-Hartley variety of crisis and those which create *non-Taft-Hartley* crises—except for the element of degree, is one and the same. It is a single problem composed of three facets:

(a) how to permit to the disputants in labor controversies, whether large or small, the maximum of independent action in composing their private disputes;

(b) how to prevent such private controversies not only from impinging upon the peace and welfare of *all* the inhabitants of the areas affected by the dispute, including the disputants themselves, but, as well, to prevent the deprivation of the full enjoyment by nondisputants of *their* private rights; and

(c) how to *implement* such preventive measures without impairing our democratic institutions or the constitutional rights of the disputants, without *sacrificing* the rights and privileges of nondisputants or the community as a whole.

These factors of the problem have the same pertinence in *non-Taft-Hartley* crises as they do in the Taft-Hartley category of crisis. Any solution which can effectively meet the perplexities of either category of strike, subject only, perhaps, to considerations of mechanistic implementation, will necessarily supply a solution for the other category of strikes.

Government Intervention and Seizure

In the intermediate stages of the subject article, governmental intervention in labor disputes by the requirement of obligatory arbitration is deplored as interjecting the government too immediately and deeply into the private affairs of the disputants; as placing upon the government the moral duty of regulating the price structure and guaranteeing profits to management; and as a harbinger of the dissolution of our democratic institutions. While the discussion of the validity or invalidity of this thesis is premature at this point, the premises themselves are most interesting, particularly in view of the author's own proposal in which the article culminates. Following the presentation of these pivotal premises and expressions of concern for the security of constitutional government, the ensuing nostrum for emergency strikes is offered.

"It is submitted that government seizure and operation of a plant for a temporary period to tide over the emergency is the *least objectionable* method by which the government may intervene to protect the public where its health or safety is threatened by the stalling of a plant or facility involved in a labor dispute. Seizure and operation by the government emphasizes that fact that the seized business is being operated in the public interest rather than in the interest of the private owner. Seizure seems also to be the best way to divorce government intervention in

crisis situations from the collective bargaining dispute which gave rise to it." (Italics supplied.)

Disregarding the blandness of its presentation, the proposal itself is nothing short of terrifying. Seizure and expropriation—in peacetime!³ The incongruity of this appalling proposition alongside of the author's professed alarm for our democratic institutions where the law merely requires that the parties compose their differences by peaceful arbitration is no less breath-taking than the startling proposal itself. The contradiction is incomprehensible. In assessing the enormity of this proposal one must ever be mindful of the realities of the so-called emergency strikes of the last few years, as well as the coal miners' strike that is paralyzing the country as this article is being written. Not a single one of these strikes was precipitated by management. The most direct contribution by management to these several impasses was, at worst, its refusal to comply with too-often exorbitant demands of the striking unions. Not a single one of these strikes was caused by lockout or any other direct act of the employer. The labor unions involved were, in each case, the moving and acting parties. It was they, whether rightly or wrongly, who precipitated and prosecuted these work-stoppages. It is not the burden of this point of this dissertation to explore the propriety or reasonableness of the various unions' demands. The point to be made is that it was the unions, rather than management, who declared and executed the so-called emergency strikes. Short of spontaneous and involuntary submission to the aggressor, so to speak, the employers involved were helpless to stave off the various disasters.

Applying these realities to the proposal of *seizure*, if a necessary incident of a strike creating a crisis was the seizure and ensuing, even though temporary, expropriation by the government of the employer's plants, profits and facilities, then the strategists of any designing labor union in a critical industry would be gratuitously endowed with one of the most powerful and unequal weapons possible within our society. That the seizure would be *accomplished* rather than *prevented* by government renders the proposal trebly ominous. To invest those who have the greatest stake in averting failure in important strikes and all that such failure implies for them personally—the strategists and paid personnel of labor unions—with the power to hurl the tremendous resources and strength of the government into the controversy on their side would be to place in their grasp a bludgeon too ponderous for any employer to resist, whatever its size. One has difficulty erasing the memory of armed soldiers physically and forcibly ejecting Sewell Avery from his private offices at the Chicago plant of Montgomery Ward. It has ever been a moot question whether such unforgettable measures were justified in defense of the dignity of the War Labor Disputes Board even in time of war. There have been

³ Notwithstanding that, due entirely to presidential procrastination and to the absence of intelligent pre-planning, so noxious a situation has been created in the current coal strike emergency that governmental seizure of the mines may be an accomplished fact by the time this article reaches print, the accomplishment of the wrong, any more in labor relations than elsewhere, does not convert wrong into right.

many who have thought less terrifying measures would have been equally sufficient and less noxious to democratic process.

Whatever may be said of such forcible tactics in time of war, this much may be said of them in time of peace—they are intolerable and indefensible, and they must not be suffered to be, not even in the name of *collective bargaining*. Whether by direction or indirection, to place this horrendous instrument at the disposal of any disgruntled or ambitious union strategist or combination of strategists is wholly and completely inadmissible unless we are immediately prepared to witness the substitution of a labor oligarchy for government of and for all the people. Nor does this unspeakable eventuality become less inadmissible because it is done in beatification of collective bargaining.

Collective bargaining is itself only a product of, and cannot exist without, democracy. To destroy any essential pillar of the temple of democracy to fabricate a shrine for collective bargaining will surely be to destroy them both. If the price of *perfected* collective bargaining, even in distressing circumstances, is the destruction of only one small stone in the arch of democracy, we had better content ourselves, even in such vexatious circumstances, with *imperfect* collective bargaining, lest we send the entire edifice of constitutional government crashing into a volcano of dust. No amount of literary amiability, piety, rationalization, citation, quotation or abomination will alter the plain and simple fact that the confiscation of property, whether one's own or that of one's enemies—industrial or otherwise—cannot obtain or be tolerated in a democracy, certainly not so long as it purports to be a democracy. And, at least as of this moment, not too many of us are prepared to admit that the exigencies of collective bargaining as an institution or the advancement of organized labor's privileges or prerogatives require the dismemberment or interment of the democratic state.

It is very interesting to note two very illuminating aspects of this proffered panacea. In the first place, any apprehension which is exhibited in the subject article in connection with the matter of seizure of the employer's property is not connected with the basic issue of seizure but consists of an enormous care that such seizure should not result in employer advantage. In this regard, it may be said that most people with an awareness of constitutional process would be revolted and horrified by the suggestion of seizure per se, whether of the employer's property or anyone else's, and whether with or without advantage to the victim of the unconstitutional confiscation.

The second phase of the proposal is even more curious. Although the seizure of the employer's capital facilities is tendered with an inexplicable facility, no comparable seizure of the property of the moving labor union is proposed. Having confiscated the employer's property, the author of the subject article proposes, as against the union which produced the crisis, such heroic measures as withholding union security privileges and the right to collect dues and the like. It is nowhere suggested that the union's treasury, the income of its investments, its real estate

and its books and records be seized along with the employer's equivalent belongings. It is not suggested that the affairs of the union thenceforward be managed and conducted by a governmental operative as in the case of the employer's affairs. It is the essence of the proposal that only the employer be dispossessed and disfranchised. Moreover, while it is clearly demonstrated that no concern for the public welfare will be evinced by the employer, the article exhibits supreme confidence that: "Because [the] seizure emphasizes public interests and excludes the possibility of private profit, American workers may be expected to work voluntarily at [the] seized plants." On the basis of the compassion for the public need displayed by the coal miners, or the comforting and selfless dedication to public interest that has in the past been manifested by the workers in the three-year oil strike, the various and crippling national and local transportation strikes, the longshoremen and maritime strikes and the sundry other critical strikes, we experience no such reassuring confidence. Indeed, the public and intemperate utterances of such labor luminaries as Michael Quill of the Transport Workers Union—in the recently threatened strike against the Philadelphia Transit Company (a transportation utility servicing a city of two million residents almost wholly dependent upon its facilities)—James B. Carey of the International United Electrical etc. Workers, Mr. John Lewis and a host of other union spokesmen are of such a nature as to disabuse even the most naive of any illusions on the subject.

Pre-Clayton Act Era

As against the questionable proposal of seizure of the employer's facilities as a solution to the problem under consideration, let us advert our attention to two of the principal proposals of others with which the author dealt so summarily. The first of these concerned the existing broadspread view that labor unions should be subjected to the antitrust laws to the same extent that business is amenable to these laws.

At the outset it is submitted that, whether this proposal be treated as merely an enlargement of the antitrust laws *or* as a restriction upon the activities of labor unions, if the underlying motive is to chastise or visit retribution upon organized labor, the motive presages ill for the success of the project. No reasonable man dare gainsay that it is not the function of government to constitute itself as a flagellist for *either* side of the industrial problem. Of course, it cannot be denied that commencing with the Clayton Act⁴ and intermittently thence forward, through the early period of the Anti-Injunction Act⁵ until the enactment of the Wagner Act (National Labor Relations Act),⁶ the federal government in all its departments, including the judiciary, stepped out of its normal role to constitute itself a benefactor of labor. Labor had hardly yet attained the status of *organized* labor. Truly, labor was then a movement of workingmen. The most casual student of the sub-

⁴ October 15, 1914, Chapter 323, 38 Stat. 730, 15 U. S. C. Sections 12 et seq.

⁵ March 23, 1932, Chapter 90, 47 Stat. 70, 29 U. S. C. Sections 101 et seq.

⁶ July 5, 1935, Chapter 372, 49 Stat. 449, 29 U. S. C. Sections 151 et seq.

ject must be fairly familiar with the agonies and obstacles that attended the growth of this movement from the time of the *Cordwainers' Case* in Philadelphia in 1806.⁷ It would be redundant to recount or enlarge upon the harrowing difficulties which workingmen were compelled to endure in achieving the right to organize. The story of imprisonment for criminal conspiracy, of injunctions, of governmental suppression, black lists, violence and sometime murder has been related many times.⁸ If not the rightness of the cause, then the inequality of employer and workingmen strength invited correction of the law itself when the law did not permit the equalization that justice and morality demanded. To this extent, the latter-day intervention of government on the side of labor, covert and overt, was supported by good conscience. Despite divided opinion, the same might be said of the enactment of the Wagner Act. However, whether for good or bad, the purposes of governmental partisanship were achieved within an unexpectedly short time following the promulgation of the Wagner Act. According to the best available estimates, membership in labor unions of all kinds and affiliations in the first decade of 1900 was somewhat less than two million. Needless to say, an organizational nucleus of such sparse numbers, particularly lacking in financial resources and faced by not infrequent governmental opposition, was unable to measure up to the determined resistance of the employer element. Exploiting its position of superior social, financial and governmental advantage, capital, as management was then called, employed every conceivable means to check this ominous labor movement. To discourage recruitment of new cohorts it visited retribution of every kind, including violence and terror, upon those workingmen whose conversion was discovered. This program of unrelenting retaliation and obstruction continued through World War I, the postwar years and into 1935. Notwithstanding this opposition and despite the loss of large blocs of members gained during the years of World War I, union membership increased steadily so that in 1935 there were approximately 3.5 million members in the various labor organizations throughout the country. However, as late as 1935, with the employer element at the height of its development and a huge proportion of a non-agricultural, civilian labor force of roughly forty-eight million unaffiliated or unemployed persons anxious for employment on any terms, this modest membership was no equal of industry or its fierce opposition.

The first governmental recognition of this untoward and unbalanced situation was evidenced by the Clayton Anti-Trust Act of 1914. This act not only legislatively affirmed the right of workingmen to organize and attempted to curb the abuse of injunctive process in labor disputes, but, in Section 6, truthfully, albeit irrelevantly, proclaimed "that the labor of a human being is not a commodity or article of commerce." The Clayton Act was a negative effort to equalize the situation. Not only was this indirection unrewarding, but the act itself was shortly

⁷ Mayor's Court. See Commons and Gilmore, *A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY*, pp. 59-248.

⁸ See I. Herbert Rothenberg, *LABOR RELATIONS* (Dennis & Company, Buffalo).

construed into hopeless ineffectuality.⁹ The disembowelment of the Clayton Act signaled not only a renewal but an exacerbation of the conditions that produced the Clayton Act. Indeed, not only the immoderation of industry but the incessant and too willing involvement of government via the intemperate use of injunctive process produced such an unconscionable state of affairs that Congress, in 1932, was moved to enact the Norris-LaGuardia (Anti-Injunction) Act. Like its predecessor, the Clayton Act, after which it was largely patterned, the Anti-Injunction Act was merely a procedural vehicle that did not deal with the basic problem. It merely sought to palliate the abusive use of the injunction. It did not directly enlarge labor's rights. It merely essayed to disqualify one of the more pernicious weapons which were used against it. The essential requirement of removing the *industrial imbalance* that existed between the working and the employer elements was not treated except to the extent that it was accorded recognition in the "policy" statement of the act (Section 2). Three years later, in 1935, the Wagner (National Labor Relations) Act was passed. This was the first *affirmative* and comprehensive effort to remove basic impediments to universal organization and to endow workingmen and their labor unions with positive and enforceable rights, as contrasted to the negative approaches of the Clayton and Anti-Injunction Acts.

The Wagner Act, like the Anti-Injunction Act, was introductorily supported by a declaration of legislative recognition of the inequality of the industrial strength between the workingman and his employer (Section 1). Some more timorous judges found it necessary to resort to the technical casuistry of "safeguarding commerce" to justify the act. However, other and more sanguine jurists had the candor to admit that the act was specially designed to advance the interests of the laboring element and unions.¹⁰

Growth of Union Power

Whether or not the Wagner Act accomplished its purpose depends on one's conception of what that purpose was. If it is conceived to be the pacification of disturbances to, and the preservation of the flow of, commerce, then on the basis of our national experience in the realm of labor relations since 1935, the act may be said to be a dismaying failure and an aggravation of the conditions that pre-existed the act. However, if one views the act as a vehicle for universal unionization and the enlargement and equalization of union strength *vis-a-vis* the employer, then no body of law, exclusive of the Constitution itself, has ever enjoyed such overwhelming and spectacular success. The suppliant workingman is no longer suppliant. He is now part of an army which is almost as unpredictable as it is irrepressible. It numbers, in two divisions alone—the CIO and AFL—fourteen million. To this may be added at least two million in such divisions

⁹ Duplex Printing Press Company v. Deering, 254 U. S. 443 (1921); Hitchman Coal & Coke Company v. Mitchell, 245 U. S. 229 (1917).

¹⁰ See Rothenberg, *op. cit.*, footnote 8, p. 300 et seq. and cases cited therein.

as the Railroad Brotherhoods, United Mine Workers, Associated Unions of America, Industrial Union of Master Craftsmen, National Federation of Telephone Workers, Independent Association of Machinists, Lithographers' International Association, Confederated Unions of America and the numerous miscellany of independent and unindentured labor unions. It is impossible to assess the cumulative financial resources of organized labor, *direct and indirect*, but on the basis of bookkeeping disclosures alone which were made to the Department of Labor by the limited number of unions which have complied with the filing requirements of the Taft-Hartley Act, it would appear that the financial potential of organized labor is nothing less than fabulous. A vague idea of this potential may be had from the fact that in the Chrysler strike in progress at the time of this writing, a single national union, the United Auto Workers, representing only a small fraction of organized labor, made it possible by a simple resolution to raise an *AUXILIARY* war chest of \$9 million within a period of only three weeks without resorting to its own tremendous resources.

When one considers these facts, together with the fact that fully one third of the nation's total available and present nonagricultural labor force of fifty-three million (and a vastly larger proportion if there is excluded from the estimated labor force the fourteen-eighteen year olds, the part-time workers, the unemployed, the partially disabled, the over-age, the incompetents and unadaptable—an almost impossible statistical project) is subject to union leadership and direction, one may properly pause and wonder whether or not a new species of imbalance has not been created. This wonderment may become consternation if one reckons that this proportional dominance of unionism is proportional only in relation to universal industry and business throughout the country, taking into account all manner of enterprise from the corner food store up. In the mass-production industries, which make up the very keystone of our entire economy, unionization of industry is almost total and complete. In these key industries a strike produces the complete cessation of operations; not one-third curtailment, but *total* stoppage. In this light, the illusion created by the proportion which unionism bears to the overall labor force dissolves and is displaced by a reality which does not conduce to lighthearted indifference or unconcern.

It would seem quite evident, then, that organized labor has long since emerged from that state of dependency in which the government was constrained to act as its guardian and protector. It is today not only the equal of industry but, as experience has amply demonstrated, superior in strength to industry, for industry, despite varying degrees of individual employer-strength, has never known such organization. A case in point is the United Mine Workers, its Mr. John L. Lewis and the coal industry. In that industry, notwithstanding the wealth and economic power of certain individual employers, the continuity and productivity of operations is determined not by the owners and operators of the mines, but by Mr. Lewis. The mines work only when the unions are "*willing and able*" to

allow them to and then only on such terms as Mr. Lewis dictates. Not Bethlehem Steel Corporation, but Mr. John L. Lewis, determines whether, when and how much the so-called *captive mines* shall produce. Neither the steel corporations nor any other coal operators, whatever their size, control the operation of their own property. Mr. Lewis has arrogated that irreclaimable right to himself. The same may be said of almost any other key industry. A recent illustration is found in the threatened strike of the long-distance telephone workers. Immediately upon the initial declaration of intention to strike by the national union, the president of an eastern Pennsylvania local of the Communications Workers of America, CIO, proclaimed that despite the terms of their contract with the local telephone companies, *he* would order his members to cease work. Such instances of the displacement of the rights of others, contractual commitments and statutory obligations by the capricious personal decision of labor leaders is becoming commonplace. There is neither space nor necessity to recount the myriad of such, and even more pointed, occurrences since the reader undoubtedly is amply familiar with a sufficient number of such instances to conclude for himself that organized labor has ceased to be a ward of the government and has become a towering force in our society.

Question of "Bigness"

It is not alone the enormous, if adolescent, size and strength of organized labor that has produced an awareness of the threat which it poses, nor, indeed, its omnivorous and insatiable appetite for increased membership. The fact of *bigness* alone is no more reason for the inordinate suppression of organized labor than, of itself, is it an adequate basis for the dissolution of business enterprise. While there are many who sincerely believe that *too-bigness* of either business or organized labor must eventually lead to self-destruction, nevertheless the element of size alone does not warrant governmental suppression or restriction. Nor has the law ever essayed to fragmentize an enterprise merely because it was "too big."¹¹ It is not suggested that the law marshal its power against organized labor solely because it is too big or because it may grow even bigger. This is not only *not* the function of the antitrust laws, but, for that matter, of any other law, for it is not within the province of government to act as an arbiter of permissive size. However, when a large industrial institution employs the economic or industrial power which is an adjunct of inordinate size to disturb the competitive system upon which our economic order is firmly founded, then the need for relief becomes present and urgent. In such a situation no one can doubt the applicability or the validity of the antitrust laws. No private business enterprise nor any combination of business enterprises, whatever the size, should be permitted to destroy or undermine the competitive system to which the country's welfare is so

¹¹ U. S. v. American Tobacco Company, 221 U. S. 106, in which leading case the Court held that the presence of monopolistic activities rather than the breadth of operations was the test of illegality under the antitrust laws.

inextricably bound. So deeply imbedded in our mores and way of life is this principle that the terms "trust" and "combine" have become sheer anathema. The question, now, is whether this liberty of destruction should be accorded to *big* organized labor any more than it may be put at the free disposal of *big* business.

It is not our purpose to torture the question of whether or not organized labor, by reason of its many practices or malpractices, constitutes or conduces to *monopoly*. Enough has been written and said by others in connection with the issue.¹² There is sufficient common knowledge of the strangulation of production and competition, the exclusion of technological advancement and the stultification of collective bargaining by "pattern" procedures to render further comment redundant.

We have already recognized that the size of organized labor, however prodigious it is presently deemed or may in the future become, in itself furnishes no justification for either repression or disintegration. For this reason, exception has been taken for good cause to such proposed legislation as the Case Bill, the Ball Bill or, later in the Eightieth Congress, the relevant portions of Congressman Hartley's bill, H. R. 3020. These legislative proposals were adapted to pulverize organized labor into minuscule organizational cells. It was, in effect, sought to accomplish this by the device of restricting bargaining to local unions with local employers, for limited numbers of employees, within severely restricted geographical boundaries. Although ostensibly and purportedly directed at the practice of industry-wide and multiple-employer bargaining—a practice which, indeed, requires some serious consideration—these measures were basically *union-busting* instruments. Whether by design or not, the complete excommunication of the federations and their component international and national unions from collective bargaining, and the compulsory investiture of exclusive control thereof in local unions only, would most certainly have spelled the dissolution of organized labor as we know it. The mere fact that the end of these legislative proposals, whether fortuitously or by intent, would achieve the atomization of organized labor is indicative of the inspiring role which the *bigness* of organized labor played in these proposed bills. And in this respect, apart from the question of whether

¹² See Leo Wolman, *Industry-wide Bargaining* (Foundation for Economic Education, Irvington-on-Hudson, New York; 1948); reprinted in *LABOR LAW JOURNAL*, December, 1949.

they were possible of enforcement, these bills were ill-augured.¹³ The fact of the matter is that none of them were basically an effort to bring labor unions within the *existing* antitrust laws, but rather constituted a new species of prohibitions not theretofore existing in law. Without again reviewing the wisdom or inadvisability of these bills, it may be stated that the merit or demerit of these proposed and novel enactments is wholly irrelevant to the issue of rendering labor unions amenable to the *existing* antitrust laws to the same extent that industry is subject thereto. Consequently, in confusing these two separate projects and in devoting itself entirely to the question of the imprudence of the Ball Bill and like legislation, the article to which this reply is made overlooked completely the prospect of applying *existing* antitrust laws to labor unions, which issue ostensibly was the subject being explored at that point of the article. It would have been more profitable to have concentrated on this issue rather than digressing to the Ball Bill, since not only was this issue the point of the discussion, but it is the one which invites the preponderance of attention.

When the Sherman Anti-Trust Act was passed by Congress in 1890, it was directed at specific evils and malpractices that were debilitating the health of the nation's economy. The act was not intended to proscribe *bigness* per se—nor is there anything in this regard in its language or in the judicial interpretation of the statute. Quite to the contrary, it has been held that mere size or complexity of organizational structure or operations alone do not bring one within purview of the act.¹⁴ It is only when the power potential deriving from unusual size, control of production or distribution is corrupted to effect restraints upon trade or

¹³ In the view of this writer at the time these bills were being considered, a greater evil would have been accomplished by their enactment than the evil—the practices of universal and multiple-employer bargaining—at which they were directed. The writer was ever mindful that at one stage of the development of labor unions the state of the law denouncing them as criminal conspiracies forced them to function as secret, extra-legal or underground organizations (See Rothenberg, *op cit.*, footnote 8). It was only when their organizations were accorded legal recognition that they discarded their underground role. At no time in labor's early development did either employer-determination or force or even governmental opposition, abort its growth. If only by reason of the terrific drive of the security of survival by collective action, no power, within the limits of the Constitution, was able to retard, let alone destroy, this movement. The extent of irresponsible or criminal extremities to which it went to advance itself was commensurate with the degree to which the law and society sought to suppress it. It was only when recognition of the legality of its organizational existence and principal activities was forthcoming that labor became *respectable* and began increasingly to comply with the laws and mores of the society in which it existed.

It was for these reasons and with the realization that fourteen to sixteen million people (already enjoying the advantage of tremendous strength, illimitable organizational wealth and the power to disjoin the entire country and its economy) would not voluntarily or easily yield to disfranchisement and the blotting out at a single stroke of the achievements of almost a hundred and fifty years' struggle, that this writer was opposed to these bills. In this writer's opinion, the most and, indeed, the worst that these proposed amendments would have produced would have been the creation of an industrial guerilla and underground movement, whose *respectability* had become forfeit, with a commensurate disregard of the law and order and of society generally; or, as an alternative possibility, the ultimate abandonment and nonenforcement of the law with the consequent loss of the prestige and supremacy of law itself, and the inevitable invitation to frustrate the operation of other and more important labor legislation.

Either of these possibilities would have been tragically worse than the conditions which these proposed bills sought to remedy.

¹⁴ *U. S. v. American Tobacco Company*, *supra*, fn. 11; *Knauer v. U. S.*, 237 F. 8.

the creation of monopolies that the act becomes operative. The fact of the matter is that, contrasted to the tremendously expanded condition of industry today, industry, at the time of the enactment of the Sherman Act, was *not* big. Nevertheless, that period was an era of trusts and mergers designed to eliminate competition and establish monopolies. It was at these manifest evils that the Sherman Act was aimed. However, it was not only illegal industrial combination or restraints of trade by industry which the act prohibited, but, contrariwise, it comprehended violations from any quarters, including labor unions.¹⁶ The act did not concern itself with such classifications as "capital" or "labor," nor did it impose liability or accord exemption according to the miscreant's industrial role. It dealt solely and entirely with illegal combinations and restraints of trade, whatever the source, and, in its early years, in accordance with its plain and intelligible language, was applied without unnatural selectivity or artificial and unprovided exemption.

While it is true that organized labor, even as industry, was far removed from its present day development or strength, it was, despite its many legal handicaps, strong enough to impose formidable restraints upon commerce. As indicated, on frequent occasions the law reached out and effectively dealt with such violations of the Sherman Act.¹⁶ In each of these cases the question of the applicability of the Sherman Act to labor unions was strenuously denied, but in each instance the particular court, in substance, held that since no specific exemption of labor unions was provided for by the act, such organizations, even as industry, were subject and amenable to its prohibitions and provisions. This position is clearly supported by the plain and simple terminology of the act itself.¹⁷ This, then, was the meaning of the Sherman Act at the turn of the twentieth century. If one pauses to reflect upon this fact he must undoubtedly wonder why there is a clamor to bring labor unions within the Sherman Act; ostensibly they are already subject to the act. Discounting the spent and purely procedural provision of the Clayton Act, the Sherman Act was never amended or revised so as to remove labor unions from its scope and purview. Consequently, since the act itself was never changed, why, then, in view of the Supreme Court's decisions affirming and reaffirming¹⁸ the act's application to organized labor as well as industry, is there any need for

¹⁶ U. S. v. Debs, 64 F. 724; U. S. v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994; U. S. v. Railway Employees' Department of American Federation of Labor et. al., 283 F. 479; Vandeell v. U. S., 6 F.2d 188.

¹⁶ U. S. v. Workingmen's Amalgamated Council of New Orleans, *supra*; Lowe v. Lawler (commonly known as the Danbury Hatters' case), 208 U. S. 274; United Mine Workers of America v. Coronada Coal Company, 259 U. S. 570 (denying relief only on evidentiary considerations); United Mine Workers of America v. Coronada Coal Company, 268 U. S. 295.

¹⁷ "Every contract, combination in the form of a trust or otherwise, . . . in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; . . ." (Italics supplied.)

¹⁸ Duplex Printing Press Company v. Deering et al., *supra*, fn. 9; American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184; Truax v. Corrigan, 257 U. S. 312; Bedford Cut Stone Company v. Journeyman Stone Cutters' Association of North America, 274 U. S. 37.

additional legislation to reiterate this principle? The answer is simple: the Sherman Act has never changed—but the constituency of the courts have.¹⁹

Unions and the Sherman Act

It is fundamental in law that under the doctrine of *stare decisis* the construction of a statute by a court of last resort becomes the law of the statute. Accordingly, it would follow that the repeated decisions of the Supreme Court and the many lesser tribunals holding labor unions to be subject to the Sherman Act became an integral and inseparable part of that statute. If revision of the act were indicated, under our constitutional form of government, it was Congress upon whom the duty devolved. It was not within the right of province of the Supreme Court or any other judicial forum to amend the act, already interpreted as it was, by supervening decision. Unfortunately, commencing with the *Apex Hosiery* case,²⁰ this is precisely what was done. Whether from dissenting social philosophy, political expediency or other cause, the new population of the Supreme Court, arrogating to itself the legislative prerogatives of Congress, rewrote the Sherman Act by the circuitous medium of interpretations and progressive restrictions upon the act's operation upon labor unions. Eventually, with the *Hutcheson* case,²¹ the Supreme Court, for all practical purposes, exonerated labor unions from the provisions of the Sherman Act except in such a restricted area²² that if the same forensic generosity were accorded to industry the result would be tantamount to complete judicial rescission of the entire act.

If one experiences disheartenment at the inconstancy and vagaries of the law, he grieves needlessly. It is not the law that is inconstant; it is the court that suffers from this affliction. However, the question of whether or not this discriminatory legislation by interpretation is consonant with juridical propriety is academic. Regardless how little comfort may be gathered from the knowledge that it is supported by tortured rationalization, the clear fact is that a judicial *fait accompli* has been achieved. The Supreme Court has spoken—or, rather, changed its mind—and from this there is no appeal or recourse, except by Congressional action. If the law is to be restored to its natural and plain meaning (and is to function for

19 Trace judicial trends and undulations in *Adkins v. Children's Hospital*, 261 U. S. 525; *West Coast Hotel Company v. Parrish*, 1 Labor Cases ¶51, 108, 312 U. S. 100; *Schechter Poultry Company v. U. S.*, 295 U. S. 495; *NLRB v. Jones & Laughlin Steel Corporation*, 1 Labor Cases ¶17, 017, 301 U. S. 1. See also L. Boudin, *op. cit.* fn. 1.

20 *Apex Hosiery Company v. Leader*, et al., 2 Labor Cases ¶17, 063, 310 U. S. 469.

21 *U. S. v. Hutcheson*, 3 Labor Cases ¶ 51, 110, 312 U. S. 219; *Hunt v. Crumboch*, 9 Labor Cases ¶51,214, 325 U. S. 821.

22 As where a union aids or collaborates with an employer to create a "business" monopoly: *Allen Bradley Company v. Local Union No. 3*, *International Brotherhood of Electrical Workers*, 9 Labor Cases ¶51,213, 325 U. S. 797; the effectuation of the same condition without the complicity of an employer having been held to fall outside the act: *U. S. v. Hutcheson*, *supra*, fn. 21; *East Texas Motor Freight Lines v. International Brotherhood of Teamsters*, *Local Union No. 568*, et al., 13 Labor Cases ¶63,904, 163 F.2d 10. See court's exposition of the law in *Mills Corporation v. Federation of Dyers etc.*, (DC N. Y.; September 19, 1946) (not officially reported), and compare with *U. S. v. Women's Sportswear Manufacturers' Association*, et al., 16 Labor Cases ¶65,052, 336 U. S. 460.

its original and basic purpose of precluding *all* ruinous restraints of trade and paralyzing monopolies in commerce, without regard to the industrial role of the offender) then it devolves upon Congress so to restore it. To trust that the discriminatory and artificial exemptions that have lately been read into the act may someday in the future be voluntarily dissolved by some new and less tender constituency in the Supreme Court is a hope in which, in the light of diverse and prevailing considerations, one must not invest too much patience or lean too heavily as against the urgent need for present relief.

There can be no question but that the Sherman Act, by its simple terminology, was devised to eliminate *all* prohibited restraints of trade and monopolies. Apart from technical reasons that exclude unprovided exemptions from the operation of the act, there seems to be no adequate reason why organized labor should *presently* be immunized against the act to any greater extent than industry.²³ It was previously sought to be demonstrated herein that whatever considerations of morality or good conscience that earlier inspired judicial and other governmental assistance to labor because of its unequal and disparate size and strength as against industry, these are no longer valid considerations because organized labor, most certainly strengthwise, has acquired a stature to strike fear in the heart of almost all, if not all, of the various levels of industry. Accordingly, such considerations no longer are pertinent. The real point is whether and why organized labor, which presently is at least equal to, if not stronger than, industry in industrial vendettas, should be excluded from the operation of the law to a greater extent than industry, if it, no less than industry, has the present capacity and the disposition to disrupt commerce by intolerable restraints, monopolies and malpractices. If organized labor does have this capacity and disposition, then organized labor, no less than industry, should be unequivocally subjected to the Sherman Act. This should be done without favoritism, discrimination or fear, and done immediately.²⁴

A healthy commerce either is, as is universally proclaimed, the very keystone of national economic well-being—or it is not. It is either a fact or a sham. It is inadmissible to urge that the national welfare is inseparably intertwined with commerce when self-aggrandizing industry-activity is sought to be enjoined and, at one and the same time, assert that free commerce is not sufficiently important to the national welfare to support comparable limitations upon equally noxious and self-interested interferences by organized labor. Commerce cannot ride two horses at once. If it is of the essence of the national well-being, then it is paramount to the private interests of both industry and organized labor as well as of all political considerations which conduce to partisan favoritism. If it is not, then all legisla-

²³ See and compare *U. S. v. Hutcheson*, supra, fn. 21; *East Texas Motor Freight Lines v. International Brotherhood of Teamsters, Local Union No. 568*, et al., supra, fn. 22; *Mills Corporation v. Federation of Dyers etc.*, supra, fn. 22; *U. S. v. Women's Sportwear Manufacturers' Association*, supra, fn. 22.

²⁴ Unlike the Case Bill and the like, a measure of this kind is fair, and essential and capable of enforcement.

tion enacted in the name of commerce and supported only by affirmations of its supreme importance, such as the Sherman Anti-Trust Act itself, the Clayton Anti-Trust Act, the Railway Labor Act, the Anti-Injunction Act, the National Labor Relations Act, the Byrnes Act, the Fair Labor Standards and the plethora of other statutes, are pure pretense and political chicanery. Moreover, they are unconstitutional since only on the basis of the protection of commerce were each of the named enactments spared from being stricken down as Congressional invasions²⁵ of constitutionally guaranteed private rights and privileges.

It is in the firm conviction that a healthy and untrammelled commerce *is* of the marrow of the national economic well-being that it is here submitted that it must be guarded against injuries and interferences from whatever source. It is with equal vigor that it is here further submitted that to the extent that commerce must be protected against encroachments by industry, to the same degree and with like energy must it be safeguarded against the transgressions and trespasses of organized labor. The law should "exalt" neither industry nor labor above the common welfare.²⁶ In regard to industry the federal antitrust laws²⁷ already impose *broad* and enforceable prohibitions against the restraints of trade and monopolies which would otherwise wreak irremediable havoc upon commerce. What are most urgently required to assure the integrity and security of commerce are comparable and equally broad limitations upon the activities of organized labor which imperil commerce. It is this very purpose which the bill²⁸ that Congressman J. Frank Wilson of Texas recently tossed into the House hopper seeks to accomplish. This bill not only would render organized labor amenable to the prohibitions against injuring and impairing commerce to which industry is subject, but also would implement this prohibition by removing the bar to injunctive relief which stems

25. Compare U. S. v. Darby Lumber Company (overruling *Hammer v. Dagenhart*) and *West Coast Hotel Company v. Parrish* with *Adkins v. Children's Hospital* (all of which cases are cited at fn. 19) and *Morehead v. People of State of New York ex rel. Tipaldo*, 298 U. S. 587. This comparison should yield an enriching experience with the art of ratiocination. See also *Northern Securities Company v. U. S.*, 193 U. S. 197; *Swift & Company v. U. S.*, 196 U. S. 375; *Schechter Poultry Company v. U. S.*, supra, fn. 19; *Consolidated Edison Company v. NLRB*, 1 Labor Cases ¶17,038, 305 U. S. 197; *Associated Press v. NLRB*, 1 Labor Cases ¶17,015, 301 U. S. 103; *Washington, Virginia & Maryland Coach Company v. NLRB*, 1 Labor Cases ¶ 17,016, 301 U. S. 142; *NLRB v. Fruehauf Trailer Company*, 1 Labor Cases ¶ 17,019, 301 U. S. 49; *NLRB v. Jones & Laughlin Steel Company*, supra, fn. 19.

26. See *Giboney v. Empire Storage & Ice Company*, 16 Labor Cases ¶65,062, 336 U. S. 490.

27. Effective antitrust laws exist in the following states: Missouri (Revised Statutes 1939, Missouri Revised Statutes Annotated, Section 8301 (declared constitutional in *Giboney v. Empire Storage & Ice Company*, supra, fn. 26)); Montana (Revised Code, Section 10901); New Mexico (Statutes 1941, Section 1104, augmented by prohibition of racial discrimination by labor unions, Act of 1949, S. B. 45); New York (Consolidated Laws Chapter 20, Section 3240, as amended by Chapter 12, Laws 1935, augmented by "Law against Discrimination" Act Consolidated Laws Chapter 18, incorporated in Executive Law Chapter 23, Laws 1939, by Chapter 118, Laws 1945, prohibiting racial discrimination by labor unions); South Carolina (Code of 1942, Sections 6620-2, 6624-5, 6628); Texas (Vernon's Revised Civil Statutes 7428, as amended by Chapter 309-10, Laws 1947).

28. H. R. 6681, 81st Congress. See also, H. R. 6677, 81st Congress, introduced by Congressman Walter, putting teeth into the Sherman Act by increasing fines in criminal prosecutions from \$5,000 to \$50,000 for violation of the act by *anyone*. Both bills, upon recommendation by the Senate Banking Committee, are currently being studied by the House Judiciary Committee.

from Section 20 of the Clayton Act and from the Anti-Injunction Act. Without this implementation the attempt to bring organized labor unqualifiedly within the provisions of the Sherman Act would be futile and sterile for it may be remembered that in the *Lumber Products Association* case²⁹ the Supreme Court held that despite the fact that "an illegal conspiracy was proven at trial," the Court was powerless to grant relief because of the provisions of the Anti-Injunction Act.

In the foregoing convictions exception is taken to the summary dismissal by the subject article of the broadening of the antitrust laws as a valid proposal in dealing with the labor problem. It is by no means suggested that even the most absolute subjection of organized labor to the antitrust laws would provide a comprehensive solution to this complex problem. It is doubtful whether any one expedient, however astute, will suffice to encompass all of the many aspects and phases of this most intricate problem. The complete solution, if it is ever discovered, no doubt will be composed of as many facets as the problem has parts. This, however, is no reason for the bluff rejection of a direct and single approach to what is only a single aspect of the whole problem, particularly in absence of a better formula for treating with this specific and vexatious difficulty. By making the antitrust laws equally applicable to industry and organized labor, at least so much of the invidious activities of *both* industry and organized labor which, as destructive restraints upon commerce and monopolies in commerce, militate against the public good may be effectively curtailed and remedied.

Labor Problems

While illegal restraints of trade and monopolies in commerce, by whomsoever they may be perpetrated, are intolerable and must be dealt with adequately, the over-all labor problem presents many other no less daring challenges to the national well-being which must be faced with a courage and determination equal to the challenge. When one contemplates the enormity and the incredible variety of demands that are made upon our national economy, one becomes alarmed for its continued stability and wonders how the spectre of chaos can be escaped. It is a day of wild and unrestrained grabbing: foreign commitments that add up to incalculable and unprecedented billions of dollars, military appropriations the cost of which exceed the monetary worth of the whole nation as of not so many years ago, domestic subsidies whose cost is enough to finance whole nations of the world. The corrosive and haunting fear of the world exploding in a war of extermination, the hectic and mad pace of modern life, the violent and alternating sieges of inflation and recession and the myriad of domestic crises that are daily created are surely inducing a national restiveness and lack of equanimity which in an individual would beg the urgent attention of a psychiatrist. The composure and amenity of living is being supplanted and displaced by tension, cupidity and hatred.

²⁹ *Lumber Products Association Inc., et al., v. U. S.*, 12 Labor Cases ¶15,251, 330 U. S. 395.

No mean contributor to this choleric state of national irascibility is the vexatious labor problem. However much a disinterested person, in viewing the labor scene, may be determined to appraise the situation objectively and with calm, he is helpless to resist, first, a sense of disillusionment, then a feeling of exasperation and, finally, an overpowering surge of resentment and rage. It is literally impossible for one to remain tranquil at the things that are perpetrated in the name of labor relations. Indeed, the recurring contests and the sustained state of excitement and conflict precludes the possibility of tranquility or calm.

If one, even without personal interest or participation in the problem, merely reads the daily newspapers, he must become infected by the acrid fumes of continuing hostility and disquiet. Every day in some part of the country he reads of a labor crisis which exists in some industry over some issue. He is told that, by and large, most contracts mature at a given season of the year. With patience he abides the strike, the pernicious activities of the contestants, the curtailment of the flow of essential products and the resultant unemployment that accrues in other industries dependent upon the one in which the strike or strikes have occurred. At length, but not before the strikers obtain their demands, the strike ends. The individual then settles back and relaxes in the trust that at least until next year there will be no recurrence of a similar nature. However, this comforting trust soon proves to be completely without justification, for in a matter of days a new strike erupts in another industry, in another part of the country, over another issue. Patiently and dispassionately he endures this strike. When eventually this strike is ended, the strikers having gained their ends, he hopefully anticipates at least a reasonable spell of industrial harmony and peace. Unfortunately, however, he is in miserable error, for the following day a new strike explodes in another important industry, in a different place, over a new issue. With increasing emotion and animus he watches the cycle repeat and repeat itself. Each day, in another place, a new issue detonates a new strike. His annoyance soon changes to exasperation and, shortly, to disgust and distress. He immediately discovers that there is no season for contract renewals and strikes. He learns that this is a continuing and unrelenting state of affairs. Only the scene, the issues, the industry and the gravity of the strike vary. The longer he concerns himself with his problem, the more vexatious and perplexing does it become. He shortly commences to view it as a problem without an end or solution.

With the inevitability of weather, demands for new increases in wages, tonnage and percentage demands, demands for retirement benefits, security of tenure, enlarged vacations and *memorial* holidays, exaction of more money for less work, compulsory reduction in the rate of production, annual wages and a boundless variety of increases in old demands and the introduction of new species of demands, are constantly presented and benefits extorted by means of the irresistible strike. The demandants' appetite and cupidity seem to be insatiable. There can be little doubt that there is oftentimes fair basis and justice for many of the demands

for which some strikes are prosecuted; nor can there be any less doubt that frequently industry, with a cunning and avarice of its own, is the *provocateur* of the dispute. This intermittent justification, however, does not vindicate or exculpate the rapacious voracity that supports over-all labor agitation. While it is understandable that organized labor should desire to obtain the most that the traffic will bear, or, on the other side, that industry should endeavor to retain the maximum for itself, the recognition and acknowledgment of these human foibles is no reason to permit either of these elements to endanger the national well-being at the expense of the remainder of us.

Labor Disputes and Violence

Society will not permit two individuals, whatever their dispute, with impunity either to attack and maim one another or to embroil and injure innocent third persons not involved in their differences. For their own good and the good of society generally, the law, despite the rightness or the wrongness of the controversy, will not permit the disputants to take the law into their own hands and injure either themselves or innocent bystanders. Reason would indicate that if this privilege were accorded to two persons it should be accorded to all citizens of the state.⁸⁰ Needless to say, if this unimaginable license for assault and reciprocal injury were accorded to all citizens of the commonwealth, we should shortly degenerate into a state of cannibalism and the disintegration of society as we know it would inevitably follow. Such a condition in these times would seem to be sheer fantasy. But, then, one wonders whether or not such a condition does not in reality exist today. Shorn of such legalistic trappings as *Senn v. Tile Layers Protective Union, No. 5*⁸¹ and *Thornhill v. Alabama*⁸² and such terms as "collective-bargaining," "concerted activities" and the like, does not such a state of animal conflict exist today? In no other realm of society is it permitted to individuals to combine themselves in groups and pit themselves against one another and, without undue restraint by law, enjoy the complete liberty of demolishing one another either physically or financially.

It is of little comfort to society generally or to those who are innocently injured thereby to assert that this luxury of reciprocal extermination is essential because the controversy is called by the name of "labor dispute." Would the mere application of peculiar terminology to individual conflict and violence impart to it the same privilege or immunity which the application of a title imparts to the project of such mass conflict and disturbances? It would seem that whether strife, be it mass or individual, goes by the name of "labor dispute" or any other title, it is in-

⁸⁰ "If one man can be allowed to determine for himself what the law is, every man can."—Mr. Justice Frankfurter in *U. S. v. United Mine Workers of America et al.*, 12 Labor Cases ¶51,239, 330 U. S. 258.

⁸¹ 1 Labor Cases ¶ 17,023, 301 U. S. 468.

⁸² 2 Labor Cases ¶17,059, 310 U. S. 88.

admissible in organized society.³³ This principle should have greater force and validity in the case of mass conflict than it would in the instance of individual controversy since, obviously, a greater injury to society can be inflicted by the actions of large groups of persons, numbering in the many thousands, than can be caused by isolated and individual combatants.

There are those who, while admitting the burdens imposed upon the national well-being by labor disputes, assert that these trials must be endured because of the tremendous size of both organized labor and industry, and, more particularly, because of their combined control of production. Not only is this craven and disingenuous, but it runs counter to the reality of the situation. In the first place, it is error to treat organized labor as a unified and single mass, with a single mind, a single purpose and a single tongue. Without laboring the point too strenuously or elaborately, it may be said that in view of the hostility and animus that exists between the several federations of labor, their leaders and their constituents, between federated and independent labor organizations and between unionized labor and the enormous body of nonunionized labor, and, moreover, in the light of the diversity of political affiliations, outlook and social interests that exist in the many levels of labor and in its myriad quarters, it is futile and illusory to view labor as either "organized" or as a homogeneous and single-minded mass of humanity.

In the higher strata of labor the intra- and inter-fraternal feuds and other evidences of internecine hostility are sufficiently pointed up by the daily newspapers as well as by history itself. On the lower levels, in which neither newspapers nor history have any interest, interesting proof of this buoyancy and insolidity of labor's *unity* is found in the intolerance and impatience with which a workingman views a strike in which he has no reasonable interest but which seriously discommodates him. In such circumstance he assumes himself to be an injured member of the "public." It is equally fallacious to assume that all parts and sections of labor subscribe to the positions of their leaders or the trends and projects which the few spokesmen of so-called "organized" labor essay to establish and pursue. It is common information that large parts of the body of working people dissent from these views and purposes as either untimely, apolitical or asocial. Moreover, with the exception of some few mass-production industries, neither industry nor labor is so concentrated or so unified that either of them exercises the complete control or dominion over production which is proclaimed or pretended.

It must not be forgotten that in almost all parts of commerce, with few exceptions, a tremendous body of unorganized labor exists. Indeed, as previously indicated, there are at the present time in industrial quarters at least twice as many

³³ Unions cannot adopt a process which would disintegrate society, no matter how right they are: Judge T. Allen Goldsborough in *U. S. v. Brotherhood of Locomotive Engineers, et al.*, 15 Labor Cases ¶64,612, 79 F. Supp. 485 (1948); cert. den. 335 U. S. 867.

nonunionized workingmen as there are union adherents. It is calculated that even in those enrolled members of labor unions, a large percentage of the membership ties are compulsory and involuntary, and that amongst these and other members of labor unions a tremendous base of dissent and disagreement exists. Accordingly, "organized" labor, mass-production industries excepted, does not enjoy the effective control of production which it arrogates. However, even if it were assumed, contrary to fact, that either industry or organized labor did exercise the cohesive and effective control and dominion over production which each claims, it would be disastrous to us as a nation to permit either of them to imperil the national welfare for private interests.

As postulated by the subject article, labor unions are private organizations. Their rights and prerogatives, therefore, must be confined to the areas and limits of private interests. No one has yet had the temerity to suggest that labor, organized or otherwise, is superior to the law,⁸⁴ or that it should in its private character be privileged to enjoy public rights, or, more accurately, that public rights be subordinated to labor's enjoyment of its own private rights.⁸⁵ If this were the case, then there would be irresistible justice in the view that labor unions should be viewed as "affected with public interest" and should be subjected to cautionary governmental regulation. On the other hand, if it is contended that organized labor so effectively controls production and has become so powerful that government dare not seek to introduce reason into the labor situation lest labor be antagonized and curtail production, then whoever adheres to this frightful belief should state his proposition forthright.

On the basis of the proclamations and activities, as well as the past and present political affiliations and leanings of certain persons, it may be said that there are some who truly adhere to such a belief and are of the firm conviction that the government should surrender the reins of direction to labor. Prime Minister Clement Atlee, in his book entitled *The Labour Party in Perspective*, wrote as follows of the purposes of labor union: "It is, in the first place, an organization of wage-earners working within the framework of capitalist society in order to defend its members from injustice and to gain for them advantages. On the other hand, it is also in opposition to the existing system of society which it seeks to alter. . . ." If this is the view of organized labor or any substantial segment thereof, it should decently be made known. If, however, we proceed on the premise that American labor does not seek to wreak any irreparable injury to our constitutional form of government, and that, as a whole, it represents a section of our society which is

⁸⁴ "No man is above the law."—Mr. Justice Rutledge in *U. S. v. United Mine Workers of America et al.*, supra, fn. 30.

The late estimable Oliver Wendell Holmes, in his *HARVARD PAPERS* said, "When either the power of capital or labor is asserted in such a way as to attack the life of the community, those who seek their private interest at such cost are *public enemies* and should be dealt with as such." See C. A. Huebner, op cit., fn. 1.

⁸⁵ See C. A. Malick, op cit., fn. 1, and D. Mitrany, op cit., fn. 1.

loyal to our democratic ideas and possesses a wholesome respect for the law, then we have the right to expect it to comply with the law as it may now or hereafter be written in the interests of the common welfare.³⁶

Interests of Society

This, then, brings us to the question of how peaceably and lawfully to deal with the labor problem, with fairness and consideration not only for labor and industry, but for *all* people, including labor and industry. For this purpose obligatory arbitration presents itself as a distinct possibility. It is submitted that if the formula of obligatory arbitration is an effective working instrument in composing labor disputes, it should be employed universally without distinction between the so-called emergency strike and the nonemergency strike, for, as was previously sought to be demonstrated, if it is acceptable in either case, it is acceptable in the other category of strike.

At the outset, it may be conceded that many sections of both industry and organized labor reject obligatory arbitration.³⁷ However, if such an instrumentality is in the best interests of the public welfare, the resistance or objection of either or both these sections of society is not sufficient reason to reject it.³⁸ As Mr. Justice Brandeis, in the case of *Duplex Printing Press Company v. Deering et al.*,³⁹ said: "*Above all rights is duty to the community.*" The rights of the public and of society generally are paramount to the rights of either or both industry and labor. Thus, the question is not whether industry and capital prefer obligatory arbitration to the right of reciprocal immolation, but whether or not this vehicle will best serve the interests of society.

On the basis of past and present experiences, it may be said that, left to their own devices, both industry and organized labor will continue to use the method of force and combat to obtain their individual interests and will completely disregard the best interests of the society in which they exist. On the basis of such existing experience, there is no valid reason to anticipate that either of them will in the future, any more than in the past, subordinate its private interests to the public good. In recognition of these facts and in the firm conviction that there is no alternative, it is submitted that the public welfare demands that these antagonists must be compulsorily required to compose their differences by peaceable means. If such obligatory measures fortuitously abridge some of the lesser

³⁶ Every citizen owes primary allegiance to the public, and secondary allegiance to his labor union: William L. Huggins, *LABOR AND DEMOCRACY* (The Macmillan Company, New York, 1922).

³⁷ House Labor Committee (80th Congress, Volume 5), pp. 3027-3028; Bruce B. Hawat, *Will We Toss "Blank Check" Arbitration Out?* *MASS TRANSPORTATION* (June, 1949), p. 35; House Labor Committee (80th Congress, Volume 3), p. 1547.

³⁸ Freedom and constitutional rights of individuals must yield to those of society in labor relations as they have in other fields: Carl A. Huebner, *op cit.*, fn. 1; Jerre S. Williams, *op cit.*, fn. 1; James A. Emery, *Address before National Founders Association of New York*, 30 *J. AM. JUD. SOC'Y* 124 (1946); Donald R. Richberg, *op cit.*, fn. 1.

³⁹ *Supra*, fn. 9, p. 488.

private or individual privileges of these incorrigible pugilists, it may truthfully be said that this circumstance is the product of their own iniquity. In the subject article, it is freely admitted that both management and labor unions have failed in their responsibilities to each other as well as to the public. That being the case, the public is left with no alternative but to protect itself. It is no defense to say, as the author of that article has said,⁴⁰ that: "The failure of union leaders fully to accept their responsibilities in the process of collective bargaining is attributable in large part to the fact that they have not grown in stature to the extent that their organizations have grown in numbers and power." This is unquestionably true. However, on the basis of the national labor relations experience of the last hundred years, there is no persuasive reason to anticipate that an even greater growth in the power and membership of organized labor will abate or diminish the apparently insatiable appetite of the leaders of organized labor for increased power and the exclusive right of decision. It is submitted that the heart and lungs of power is the lust for more power. Consequently, it is to be doubted that the more powerful organized labor becomes the more sensitive its conscience and concern for the public good will become. Such a trust would be narcotic if not fatal. If society is to protect itself, it must use its own resources rather than rely upon the magnanimity or the sensibilities of labor leaders.

The author of the article in question has asserted that: "The public has no right to be completely immunized from the consequences of strikes. The interests supporting collective bargaining are important enough to expect the public to be discommoded for the time being. . . ." To say the very least, this proposition is a strangely curious one; it would seem that its converse would be more valid. There is no reason why either industry or organized labor should have the right to have its private disputes immunized from the claims and demands of the public welfare. It seems elementary that, in justice, these constituent elements of society should be discommoded in the exercise of their private rights rather than that society as a whole should be thus visited. It is idle to assert that, since society is the beneficiary of the products of collective bargaining, industry and organized labor should be permitted to exploit their collective bargaining rights without restraint, and at whatever cost to society. It would be more accurate to state that the collective bargaining rights of industry and organized labor are the products of society's generosity and its devotion to democratic institutions. If reasonable limitations must be imposed, they should be levied upon the *endowed* rights of industry and organized labor rather than upon the natural rights of the citizenry as a whole.

⁴⁰ The portion of the subject article embracing the recited quotation was taken verbatim from pages 329-331 of Mr. Teller's book *MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING* (Baker-Voorhis, New York, 1947).

Obligatory Arbitration

Concerning the constitutionality of a measure requiring obligatory arbitration, there is ample reason to suppose that legislation which is mechanically proper would be held to be constitutional.⁴¹ It may be recognized that several state statutes prescribing obligatory arbitration in labor disputes in public utilities have been declared unconstitutional. This, however, resulted from the mechanics rather than the basic law and functions of these statutes.⁴² The invalidation of these local statutes was not predicated upon any asserted invasion of fundamental constitutional guarantees. In light of the latter-day awareness of the Supreme Court of the acuteness of the labor problem⁴³ and remembering the effective role which Congressional declaration of public policy played in the recognition of the constitutionality of such legislation as the Anti-Injunction Act, the Wagner Act, the Fair Labor Standards Act and the Taft-Hartley Act, it is not unreasonable to assume that a statute which was mechanically acceptable and which would preface the requirement of obligatory arbitration by an adequate Congressional declaration of public policy would be declared and held to be constitutional.

Two of the principal objections that have been interposed to obligatory arbitration are, first, that the experience in other places advises against the enactment of such national legislation and, second, that the interjection of the government into industrial disputes as an arbiter would impose upon the government the duty of adjusting and readjusting the price structure and other factors of the national economy to conform to and accommodate the arbitrators' decision. It is difficult to accede to the validity of either of these objections. The only real and actual domestic experience we have had with obligatory arbitration derives from the operations of the Kansas Court of Industrial Relations which the legislature of the State of Kansas created by statute in 1920. The peculiar results of this purely local experiment can hardly be accepted as a standard for measuring the anticipated effectiveness of a truly circumspect and well-administered national effort to explore this medium. In the first instance, part of the Kansas statute was declared unconstitutional less than three years after its enactment.⁴⁴ Moreover, apart from this early crippling of the act, there was never any truly serious and expansive effort made to administer its provisions, however inadequate and improvised these particular provisions may have been. Indeed, the court itself was abolished by statute less than five years after it was created. It may be further ad-

⁴¹ J. A. Sprunk, *op cit.*, fn. 1.

⁴² New Jersey Laws 1947, Chapter 38, which was declared unconstitutional in the case of *State of New Jersey v. Traffic Telephone Workers' Federation of New Jersey, et al.*, 16 Labor Cases ¶65,162, 2 N. J. 335 (1949) for faulty legislative craftsmanship. The statute, however, was amended, so that this defect was cured, by the Act of 1949, Public Laws Chapter 308. In the case of *Local 170, Transport Workers Union, et al. v. Gadola*, 15 Labor Cases ¶64,725, 322 Mich. 332 (1948) a Michigan Statute requiring obligatory arbitration in labor disputes in public utilities was declared unconstitutional because of unwarranted delegation of legislative functions to the judiciary.

⁴³ See the case of *Giboney v. Empire Storage & Ice Company*, *supra*, fn. 26.

⁴⁴ *Wolff Packing Company v. Court of Industrial Relations of the State of Kansas*, 262 U. S. 522 (1923); see also 267 U. S. 552 (1925).

mitted that "a student of its operation [the Kansas Court of Industrial Relations] has concluded, after a careful analysis of its work, that the Court 'had no appreciable effect in reducing the number of industrial disputes in Kansas'."⁴⁵ It is interesting to note, however, that this author, in this very work, stated that the futility and failure of the project was chiefly due to indifference, miscarriages and the saturation of the whole effort with corrupt politics. It is inadmissible to impart to this ill-augured, maladministered and partially invalidated statute the dignity of an unassailable standard for determining the portents and validity of a genuine and sincere effort to introduce this manner of reason into the national labor problem. Though the abortive and ill-designed Kansas experiment may not have reduced the number of labor disputes, as one writer stated,⁴⁶ "Though laws prohibiting strikes will not eliminate strikes, neither do laws against speeding eliminate speeding." There can be no doubt that the ends sought by the Kansas experiment were valid. If the means by which the end was sought proved inadequate or unpropitious, then the end should not be abandoned, but the experience gained by this improvident failure should be utilized in fabricating a vehicle that will invite success.

Needless to say, agencies such as the War Labor Board, and the experiences of this and like agencies in wartime and other critical emergencies, have no application to the question of either the wisdom or mechanics of peacetime and universal obligatory arbitration. Designed for different circumstances and for different purposes, there is no point of resemblance between the former and the latter either in objective or operation and, accordingly, no basic lesson may be derived from these wartime experiences.

Since the foregoing unpersuasive experiences were our only substantial domestic trials of obligatory arbitration, we ought now consider the value of foreign experiences as a guide or standard for national decision. It would be rash to accept at face value and without further inquiry the assertion of some that the experiences of certain foreign countries with obligatory arbitration advises against such experiment. While the opinion of the author of the subject article was founded on the writings of some authors who adhere to that view, it should be noted that there is a veritable host of writers who firmly assert that the experiences in obligatory arbitration of other nations are ample justification and persuasion for us to follow suit.⁴⁷ In any event, it is submitted that, whether or not the writings of the designated or other authors are favorable to foreign experi-

⁴⁵ Domenico Gagliardo, *The Kansas Industrial Court* (University of Kansas Social Science Studies, 1941).

⁴⁶ Jerre S. Williams, *op cit.*, fn. 1.

⁴⁷ Orwell de R. Foenander, *Toward Industrial Peace in Australia* (Melbourne University Press, 1937); E. Gjessing, *Industrial Relations in Denmark*, MONTHLY LABOR REVIEW (1937); E. J. Riches, *Restoration of Compulsory Arbitration in New Zealand*, INTERNATIONAL LABOR REVIEW (1936); W. W. MacKenzie, *Industrial Arbitration in Great Britain*, (Oxford Press, 1939); *Compulsory Arbitration in Great Britain*, INTERNATIONAL LABOR REVIEW (1940); *Industrial Disputes in Sweden*, MONTHLY LABOR REVIEW (1937).

ments in obligatory arbitration, neither such favorable or unfavorable literature, nor the experiences themselves, are persuasive of the prudence or imprudence of essaying such an effort ourselves. The size, content and philosophy of the economies, industrial structures and populations of these foreign countries are so dissimilar to ours, that neither comfort nor rejection is suggested by their failures or successes in their individual experiments with the vehicle of obligatory arbitration. By and large, the entire commerce, the population and, indeed, the labor problems of these diminutive countries may, figuratively, be stuck in our vest pocket. Even as no comparison may be drawn between the enormous and complex conditions existing in this country and the wholly different conditions which exist in these small foreign countries, no more can the experiences of these pigmy nations constitute a reliable guide for the course which we must pursue in regard to our own tremendous and intricate problems. We dare neither embark upon nor forego any program for composing this Gargantuan problem of ours solely on the basis of the experiences, whether good or bad, of these small, foreign nations. Accordingly, whatever we do we must do on the basis of our own circumstances and requirements and without regard to these completely inapplicable foreign experiences.

The sole and remaining objection to obligatory arbitration is comprised of the fear that such a vehicle would, indirectly, constitute the government as a guarantor of profits and continued and sustained employment and tenure, with the ultimate hazard of governmental usurpation of the private prerogatives of both industry and organized labor. By and large, the arguments which produce this apprehension are specious and purely expedient. In the first instance, they assume that all labor controversies emanate from or involve wage disputes and other controversies that reflect themselves in costs of production. Anyone even slightly familiar with the labor problem knows that this is not the fact. And even in those controversies in which wages or other costs of production are immediately concerned, the assumption is false that such controversies, whether or not they result in the actual increase of production costs, will impose upon the government any moral duty to assure management of reasonable profits even at the expense of dislocating the price structure. The inherent vice in this assumption is that demands for increased wages and the like will always be granted, or that, if granted, the increase will eliminate a fair profit to management. The very essence of obligatory arbitration is that each case is considered on its own and individual merits as contrasted to the creation of "patterns." Thus, in each individual case it would be determined whether, under *all* the circumstances involved (with equal importance attaching to the interest of the public and the national economy as to the individual interests of the disputants), the particular demand should be granted or denied. If the demands were inadmissible *under all the circumstances*, then they would be rejected.

Again, an important factor in the granting of a proper demand would be the question of whether or not the demand would be consistent with ability to pay. However, it must not be supposed that the inability of an individual employer to pay a demanded increase, where the increase is not inconsonant with public considerations or the integrity of the national economy, would preclude the grant of the demanded increase. Nor would the grant of such an increase place the government in the position of guarantor of a profit, or permit any individual employer or group of employers *illegally* to dislocate existing price structures in order to accommodate the granted increase. If one were to assert that these results are inevitable and required by good conscience, then he flings himself into the very teeth of existing fact, for the government, in originally establishing a definite minimum wage standard and in since almost doubling that standard, has never offered or pretended to act as a guarantor or guardian of profits. The interposition of the element of public welfare into the minimum-wage problem did not by any means constitute the government as the arbiter of prices or profits. Such matters as these the government has always left to the levelling processes of competition.

The foregoing objections are neither new nor persuasive. These same objections were interposed to the Fair Labor Standards Act prior to its enactment. But, to date, despite the most forbidding prognostications, the government has not established itself as the watchdog of either prices or profits. Nor has that act spelled the frightful dissolution of our democracy that was forecast by sundry prophets of doom. Contrariwise, it has been proved to be an effective and enforceable instrument, serving the purposes for which it was promulgated, without any discernible injury to our democratic institutions. Notwithstanding the current rationalizations and portentous prophecies of the irreconcilables concerning obligatory arbitration, one has every right to anticipate that this instrumentality will prove no less effective for its particular purposes, with as little damage to constitutional processes as obtained in the case of the Fair Labor Standards Act. Moreover, one must retain in mind the basic principle that arbitration becomes *obligatory* only if and when the disputants, at the expense of the public welfare, abandon their freedom of *peaceable* adjustment of their differences and take resort to strife. As long as they avoid conflict and do not embroil the interests of society, their rights of private adjustment are unimpaired. In this sense, obligatory arbitration takes on less of a compulsory nature and becomes a product of the disputants' own making.

Operational Mechanics of Arbitration

If the proposition of obligatory arbitration is accepted as a valid premise, the next inquiry appertains to the matter of operational mechanics. It is not to be supposed that the proposals herein submitted in this regard are viewed as the most effectual or only means of implementing obligatory arbitration. They are merely intended to be suggestive. The only definite position that is taken is that

if prevailing procedures in obligatory arbitration present the objection to the use of that vehicle in labor relations, wisdom indicates a search for different procedures rather than the brusque rejection of the entire institution of obligatory arbitration.

The first question that arises in connection with the mechanics of obligatory arbitration relates to the identity of the arbitrators. The almost invariable practice adopted in prevailing obligatory arbitration procedure consists of the establishment of a body of arbitrators composed of varying but equal numbers of representatives of the disputants with the decisive vote or votes residing with a non-disputant member or members of the panel, the latter (the so-called "public" or "impartial" representation) very often being governmental agents. Except in the rarest cases (and no more than in the past) may the representatives of the respective disputants be expected to vote against or prejudice their principal's cause, with the result that the impasse that originally necessitates arbitration continues, leaving the decisive ballot to the so-called *impartial* section of the panel. Although in rare and isolated instances representatives of the disputants have been known to subordinate partisan interests to broader considerations, the infrequency and paucity of such occurrences does not conduce to the acceptance of such reasonableness and dedication to public interest as a universal *norm*, particularly if the arbitral process is mandatory. Thus, in the past (and it may be expected in the future) in the overwhelming number of cases, the determinative vote rested with the *impartial* portion of the panel. Apart from their *sometime* contribution to the crystallization of the issues, the representatives of the disputants generally do little more than accentuate and enlarge the impasse. Consequently, in the final analysis, one, two or three *impartial* men or whatever number the constituency of the panel may require, ultimately decide the controversy. The end result is no different than if the dispute had been originally submitted to the impartial member or members for their exclusive determination. One of the principal objections to obligatory arbitration derives from this very fact. Very frequently, despite the insistent application of the adjectives "impartial" or "public," the terms generally fail to fit. Particularly has this been true where government agents or *appointees* have constituted the "impartial" section of the panel. By and large the approach and outlook of governmentally selected appointees are indistinguishable from the agency making the appointment. With poignant memories of the inscrutable attitudes of the *impartial* agents and appointees of the late and unlamented War Labor Board and the Conciliation Service of the Department of Labor, there is small cause for indignation at the rejection by experienced persons of the suggestion of mandatory arbitration at the hands of *impartial* arbitrators.

Jury System

While, in the light of the foregoing experience, it is easy to understand the objections to mandatory submission to the jurisdiction and decision of one or more persons whose impartiality is a euphemism, it does not necessarily follow

that this is the only method for arbitrating controverted issues. Although there are other, and possibly more acceptable, media, it is here submitted that there is available a method for implementing obligatory arbitration which, although an inextricable and sacrosanct part of our juridical system, has never been utilized in the realm of labor relations. It is the most truly "public" and "impartial" section of our people—for it *is* the people. As the reader may have guessed, we are proposing that the jury system be introduced as an integral part of obligatory arbitration.

The jury system needs no justification. Neither the history of all mankind nor the history of jurisprudence has ever produced a better medium. Whoever disparages or decries judgment by one's own peers need only open the door to the tomb in which toss the restless bones of trial by ordeal and combat, the bloody Assizes of the infamous Judge Jeffries or the mouthless spectre of the Star Chamber.

It is no objection that every jury embraces the untutored as well as the tutored. No section of society has any monopoly either on integrity or fundamental intelligence. Moreover, when fortified with adequate information, the composite intelligence of *average people* affords a greater certainty of essential, if plain, justice than does the complex cerebral convolutions of exalted intellects with secret axes to grind. The painful intellectuality that inspires or executes an injustice is slight comfort to the aggrieved and victimized party. It cannot be doubted that it is better to have simple *justice* than scholarly *injustice*.

It will readily be conceded that in many juries there may be some individuals who, for many reasons, may prove either unacceptable or ill-prepared to comprehend or adjudge the issues in a given labor dispute, even as one may be disqualified by reason of partisan interest. This must not be construed as an admission that juries *generally* are unequal to complex tasks, for with this presumptuous view one can have but little patience. Contrariwise, it is merely recognition of a fact that exists in the impaneling of juries daily throughout the country. However, provision is made by the law for the exclusion of such individuals. By providing for examination of jurors on their *voir dire* and granting the right of challenge to both the entire panel or individual jurors, the law secures against the inclusion in juries of those who are unqualified or legally unacceptable. Even if consideration could be given to the contention that many otherwise acceptable jurors would be unequal to adjudging the complex issues involved in many labor disputes, this objection would not constitute any real impediment to the acceptability of the jury system in labor arbitration. To meet this objection, all that would be required would be to enlarge the right of examination on *voir dire* and increase the number of peremptory challenges and challenges for cause. If the enlargement of the disputants' rights in the selection of the jury were accompanied by adequate time and other limitations to forfend the use of the selection procedure as a ruse or pretext for prolonging the controversy, then the major objection to the potential quality of the jury could be eliminated. Other objections to the jury

system in arbitration of labor disputes could be negotiated and by-passed by enlarging the number of jurors in the jury and by introducing the system of decision by majority vote. It seems reasonable to assume that if a truly serious effort were made to perfect arbitration by jury, with adequate consideration being given to such matters as time limitations, mechanics and implementation, a real and effective instrumentality for composing labor controversies might be effected.

Conclusion

Before concluding this already overlong dissertation, one final element ought to be explored. This appertains to the means of compelling compliance with the jury's decision by both management and the involved labor union. Since neither governmental seizure of the employer's facilities nor the involuntary servitude of labor is admissible in democratic society, other means of compelling compliance which do less injury to the fabric of our constitutional society must be found. In this connection, it is essential to recognize that corporate violations are not the acts of the stockholders nor, generally, are labor's violations the volitional acts of the individual members of the particular labor union. In both instances the real malefactors are the executive agents and policymakers of the particular groups. It is these elements that cause strikes and lockouts. Accordingly, it is upon these groups that the *primary* responsibility must be laid. Of course, in the sense that they either condone or participate in the misconduct of their officers, both corporate stockholders and the individual members of the labor union are *secondarily* responsible. However, it must further be recognized that, paradoxically, the whole burden of the condition produced by those who actually provoke and cause the strikes is rarely borne by them. On the contrary, their activities rarely result in individual and personal loss or injury to them. The loss and hardship falls upon those who are only secondarily responsible. It would seem, then, that if individual responsibility attached to the making of such grave decisions, then less haste and more discretion would be exercised. It is quite conceivable that the board of directors of a corporate employer or the executive board of a labor union would not be so precipitate in declaring a lockout or a strike if the individuals concerned knew that personal consequences would attach to them rather than merely to their constituents.

It is this very thing that is here suggested. It is submitted that noncompliance with the decision of a lawfully constituted tribunal should result in individual responsibility in those who are primarily to blame for such noncompliance. The already abused space limitations of this article prevent a detailed recitation of the *basic* methods⁴⁸ of assessing and satisfying this primary responsibility. However, in closing, it is suggested that an *auxiliary* or *supplementary* means would be the denial to *all* aggrieving parties of every form of corporate, organizational and in-

⁴⁸ In some future article, effective operational mechanics and the means of implementing and enforcing obligatory arbitration will be considered.

dividual tax exemptions or deductions for the duration of the noncompliance. Tax exemptions, like most other exemptions, are a matter of governmental grace. Noncompliance with the law would be adequate reason for the government to deny the miscreants the tax exemptions to which they would otherwise be entitled. It is realized that in given instances an inequitable situation could be designedly produced by one side or the other. Nevertheless, with proper consideration, a suitable system of mechanical security could be achieved. To assure the persuasiveness of whatever redressing measures might be imposed, the absorption or restitution of individual levies by third persons or the organizations involved (as occurred in the case of John L. Lewis) could be effectively prohibited.

As was previously indicated, it is not suggested that any of the proposals or views herein presented are either the most effective or the most valid in the premises. No pride of authorship is taken. They are merely submitted for whatever worth they may possess and with the sincere trust that, if not in these proposals, then in some other method, a solution for the labor problem, which is intolerable as it now exists, may be found.